No. 2947

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARYLAND CASUALTY COMPANY, A Corporation of the State of Maryland,

Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, and One of the Counties of the State of Washington, and

J. L. GLAZEBROOK, as County Treasurer of said Pacific County,

Defendants in Error.

Brief of Defendants in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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STATEMENT.

Plaintiff in Error has made a partial statement of the facts, which because of its brevity may be misleading. We will therefore endeavor to make a full correct statement of the facts involved.

Defendants in Error brought action against

plaintiff in error in the Superior Court of Pacific County, Washington, for the recovery of Ten Thousand Dollars, the full penalty of a depository bond executed by plaintiff in error in behalf of the First International Bank of South Bend, Washington, to defendants in error, to secure deposits of County moneys deposited by defendants in error in said First International Bank of South Bend.

In due time the cause was on petition of plaintiff in error removed to the Federal Court for the Western District of Washington, Southern Division, where upon the issue being joined a trial was had resulting in judgment in behalf of defendants in error in the sum of $9281.32.

The Court did not make formal findings, but entered a decree adjudging certain facts in the nature of findings, covering the controlling features of the case, (Trans. p. 35), portions of which will be hereafter referred to in connection with the facts as stated by us.

On July 12th, 1915, the First International Bank of South Bend, Washington, delivered to J. L. Glazebrook, as Treasurer of Pacific County, Washington, a certain bond duly executed, as follows:

> "KNOW ALL MEN BY THESE PRESENTS, That First International Bank of South Bend, Washington, as Principal, and Maryland Cas-

ualty Company, a corporation of the State of Maryland, as surety, are firmly held and bound under J. L. Glazebrook, Treasurer of the County of Pacific, State of Washington, in the sum of Ten Thousand Dollars ($10,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

"Dated this 9th day of July, A. D. 1915.

"Whereas, the said Principal, First International Bank, has been designated by J. L. Glazebrook, Treasurer of Pacific County, as a depositary of the current funds in the hands or possession of the said Treasurer, J. L. Glazebrook, to be deposited in the said Bank; the amount whereof shall be subject to withdrawal or dimunition by said Treasurer, as the requirements of said County shall demand, and which amount may be increased or decreased as the said Treasurer may determine, and,

Whereas, the said Bank in consideration of such deposit and of the privilege of keeping same has agreed to pay the County of Pacific, State of Washington, interest on said sum upon the average daily balance the said Bank shall have on deposit for the month, or any fraction thereof next preceding the crediting of said interest, which interest shall be computed and credited to the account of J. L. Glazebrook, Treasurer of said County of Pacific, State of Washington, and shall become thenceforth a part of such deposit.

NOW, THEREFORE, if the said First International Bank shall at the beginning of every month render to the Treasurer of the County of

Pacific, State of Washington, a statement showing the daily balance of such County moneys held by it during the month next preceding and interest thereon, and how the same has been credited, and shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of J. L. Glazebrook, Treasurer as aforesaid, and shall pay over the same, or any part thereof, upon the check or written demand of said Treasurer, or to his successor in office, and shall calculate, credit and pay such interest, as aforesaid, and shall in all respect save and keep the said County, and the County Treasurer of the said County, harmless and indemnified for and by reason of the making of said deposit or deposits, and shall in all respects comply with House Bill No. 90, entitled, 'An Act regulating the keeping and deposit of public funds in Banks by the several Treasurers of the State of Washington', passed by the Legislature of the State of Washington, at its Tenth regular session, in the year 1907, then this obligation shall be void and of no effect, otherwise to be and remain in full force and effect.

PROVIDED:

1. That the Maryland Casualty Company, Surety on said bond shall have the right to terminate its liability under this obligation by serving notice of its election so to do upon the said Treasurer, and the said Surety shall be discharged from any and all liability hereunder for any default of the said First International Bank, Principal, occurring after the expiration of thir-

ty (30) days after the service of such notice.

2. The Surety shall only be liable for such proportion of the total loss or damage sustained by said Obligee, by reason of any default of the Principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to; and in no event shall the Surety hereunder be liable for any sum in excess of the penalty of this bond.

IN WITNESS WHEREOF, we have hereunto affixed our corporate seals and caused this bond to be duly signed by our respective authorized officers, Agents, or Attorneys in Fact, the date and year first hereinbefore written."

(Trans. pp. 24-25-26)

Eliminating the Ten Thousand Dollar bond sued on in this action, it was admitted that at the time the bond sued on herein was placed in the hands of Glazebrook, as County Treasurer, that he had other securities consisting of surety bonds amounting to Thirty-six Thousand Dollars, and municipal bonds and mortgages amounting to Ten Thousand Five Hundred and Twenty-five and 65-100 Dollars, making a total of Forty-six Thousand Five Hundred and Twenty-five and 65-100 Dollars, as security for moneys deposited by him in the First International Bank of South Bend.

(Admission, Trans, pp. 60-61)

That on said date the County Treasurer had on deposit in said First International Bank of South Bend, Washington, the sum of $50,349.00.

Glazebrook, as Treasurer, deposited Four Thousand Dollars on July 13th, 1915, and Four Thousand Dollars on July 14th, and on July 14th, 1915, checked out Four Thousand Dollars, (Plaintiff's Brief, p. 38), so that at the close of business on July 17th, 1915, he had on deposit, including interest computed, $52,-457.97.

(Glazebrook, Trans. p. 65).
(Finding of Court, Tr. p. 66).

Where the Court said:

> "I find the liability to be $52,457.97, amount on deposit 17th of July. I eliminate the Illinois Surety Company. I hold that the face of all bonds, municipal, local improvement, warrants and district bonds are to be included at their face with the various surety company bonds, exclusive of Illinois Surety in determining the pro rata liability. Liability on this bond is a matter of interpretation of a contract."

There was some controversy as to just when the bank closed its doors. The testimony of Langley, Bank Examiner, is probably correct. The ledger sheet of the bank, (Exhibit No. 8), showing entries on July 17th, 1915, (Trans. p. 53), and the record of the bank showing that deposits were received on the

17th day of July, (Langley, Trans. p. 54), indicate that it did business throughout Saturday, July 17th, and that its failure actually took place, so far as doing business was concerned, when it failed to open its doors on Monday morning, July 19th.

In this connection the trial court adjudged:

> "That said First International Bank of South Bend failed to open its doors on Monday, July 19th, 1915."
>
> (Trans. p. 38)

On July 14th, 1915, Glazebrook addressed a letter (Exhibit "A"), to plaintiff in error, at its office in Seattle, Washington, as follows:

> "Maryland Casualty Company,
> Seattle, Washington.
> Gentlemen:
>
> In re Bond of First International Bank.
> We have your depository bond for $10,000 dated July 9th, 1915, in favor of J. L. Glazebrook, County Treasurer.
>
> The Prosecuting Attorney refuses to approve any bond carrying the **pro rata** clause, and we ask you to kindly give us a bond in which this item is eliminated, or followed by the following:
> 'Provided, however, that if such other bonds or securities are insufficient for any reason to fully make, together with the aforesaid proposition under this bond, the full amount of interest and principal demanded and refused and interest thereafter accruing to time of actual pay-

ment to said Treasurer, then and in that event the surety hereunder shall be liable to said Treasurer to the full amount of loss sustained by reason of such insufficiency.'

If you will deliver to your agent here a bond as stated above we will deliver the bond we now have to him and take the new bond in lieu thereof.

If you prefer we promise to return to you immediately the old bond above-mentioned as of July 9th, upon receipt of new bond corrected to read as stated above.

Thanking you for your kindness in the above matter, we are,

Very truly yours,
J. L. GLAZEBROOK,
County Treasurer."

(Trans. pp. 38-39)

(Glazebrook, Trans. p. 48)

It did not require a day for the mail to reach Seattle from South Bend.

(Opinion, Trans. p. 48)

It was testified by the bonding company's witnesses that this letter reached the office of John A. Whalley & Company, Agents, to whom application for the bond was made, and who delivered it to the bank personally, on Saturday afternoon, July 17th.

(Cran-Whalley, Trans. p. 59)

In this connection the trial court found by way of adjudication,

"That it required one day for this letter to reach Seattle, Washington, from South Bend, Washington, but that it was not answered by defendant until after the 19th of July, 1915."

(Trans. p. 39)

This letter was not answered by the bonding company until after July 19th, 1915, when the bank failed to open its doors. The bond was approved by O'Phelan, Prosecuting Attorney of Pacific County, and Glazebrook, as Treasurer, on July 12th, 1915.

(Glazebrook, Trans. p. 47)

This was expressed by the trial court as a fact, (see Opinion, Trans. p. 32), as follows:

"In view of the treasurer's testimony that he and the county attorney approved the bond on July 12th, it is not necessary to consider what, if any, effect the want of such approval would have. It is true that the treasurer, in his letter of July 14th to the defendant, says:

'The Prosecuting Atty. refuses to approve any bond carrying the **pro rata** clause.'

If this be construed as meaning that the county attorney had not approved the bond, in view of the treasurer's sworn testimony that the bond had already been approved by both the county attorney and himself on the 12th of July, coupled with the fact that, on the 13th and 14th—immediately after the receipt of the bond, the treasurer made $8000 deposits, which he could not legally make without the bond, yet such unsworn misstatement does not justify the rejec-

tion of the sworn testimony, supported by such conduct."

(Trans. p. 32)

A certain bond of the Illinois Surety Company expired on July 1st, 1915, and the Treasurer's purpose in getting the bond sued on herein was to cover deposits therefore covered by the Illinois Surety Company bond.

(Glazebrook, Trans. p. 51)

The fact that the bond was not filed with the County Clerk, as required by the statute, is fully explained by the Treasurer in his testimony, as follows:

> "I did not file the bond with the clerk because the company had not sent me bond carrying the clause outlined. If I had filed it, and the company sent me the bond carrying the clause outlined, it took an order of the court to take this one, (indicating the bond sued on). It required a cancellation notice of ninety days, and in that event I would have held two bonds against this company for ten thousand dollars each."

(Glazebrook, Trans. p. 50)

In accordance with the Treasurer's testimony the Court found by way of adjudication, as follows:

> "It is further adjudged and decreed that said bond was accepted by the county treasurer of Pacific County, Washington, for present purposes, and until such time as defendant would

furnish it a new bond containing the provisions suggested in the county treasurer's letter of July 14th, 1915."

(Trans. p. 39)

On the second Monday of January, 1915, Glazebrook filed with the Board of County Commissioners of Pacific County, Washington, a written designation of the First International Bank of South Bend, as a county depository.

(Admission, Trans. p. 54)

Mr. O'Phelan, Prosecuting Attorney, demanded the clause in the bond for the sake of uniformity, and notwithstanding that fact, and without such uniformity being in the bond sued on herein he approved it.

(O'Phelan, Trans. p. 56.)

ARGUMENT.

The following statutes of the State of Washington are important to a consideration of the questions involved.

"Section 777. BONDS ARE NOT TO FAIL FOR WANT OF FORM. No bond required by law, and intended as such bond, shall be void for want of form or substance, recital or condition;

> nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond."

The Supreme Court of the State of Washington in Ihrig v. Scott, (1893), 5 Wash. 584, held the provisions of this section applicable to bonds such as the one involved in the instant case.

Section 958 provides:

> "Section 958. OFFICIAL BONDS, TO WHOM DEEMED SECURITY. The official bond of a public officer to the state, or to any county, city, town, or other municipal or public corporation of like character therein, shall be deemed a security to the state, or to such county, city, town, or other municipal or public corporation, as the case may be, and also to all persons severally, for the official delinquencies against which it is intended to provide."

Referring to county depositories the statute provides:

> "Section 5073. Before any such designation or designations shall become effectual and entitle the said treasurer to make deposits in such bank or banks, the bank or banks so designated shall within ten days after such designation or designations have been filed, file with the county clerk of such county a surety bond to such county

treasurer properly executed by some reliable surety company qualified under the laws of this State to do business therein, in the maximum amount of deposits designated by said treasurer to be carried in such bank or banks, conditioned for the prompt and faithful payment thereof on checks drawn by such treasurer, which bond must be approved by the chairman of the board of county commissioners, the prosecuting attorney and the county treasurer, or any two of such officers of said county, before being filed with the county clerk, and unless so approved the same shall not be received or filed by the county clerk; Provided that said depositary or depositaries may deposit with the county treasurer good and sufficient municipal, school district, county or State bonds or warrants, United States bond, first mortgage railroad bonds listed on the New York stock exchange, or local improvement bonds or warrants whose legality have been passed upon favorably by the supreme court or public utility bonds or warrants issued by or under the authority of any municipality of the State for water, power or light plants or maintenance thereof upon which principal or interest is not in default at the time of such deposit, the aggregate market value of which shall not be less than the amount required in said deposit, in lieu of the surety bond herein provided for."

"Sec. 5075. The county treasurer shall deposit with any depositary or depositaries which have fully complied with all requirements as herein provided, any county moneys in his hands or under his official control, and for the purpose

of making the quarterly settlement and counting funds in the hands of the treasurer any such sums so on deposit shall be deemed to be in the county treasury."

(Trans. pp. 28-29)

And Section 8327, of the statute relative to official bonds, providing as follows:

"Sec. 8327. Whenever any such official bond shall not contain the substantial matter or condition or conditions required by law, or there shall be any defect in the approval or filing thereof, such bond shall not be void so as to discharge such officer and his sureties, but they shall be bound to the State or party interested, and the State or such party may, by action instituted in any court of competent jurisdiction, suggest the defect of such bond or such approval or filing, and recover his proper and equitable demand or damages from such officer and the person or persons who intended to become and were included in such bond as sureties." (Rem. & Bal. Code).

(Trans. pp. 29-30)

The trial Court took the view that the section of the statute last above quoted is applicable to a depository bond, such as the one in suit.

In this connection Judge Cushman in his opinion, referring to this section, citing cases, said: (Op. Trans. p. 30).

"The last section quoted is applicable to a bond of a depositary, such as the one in suit.

Board of Commissioners v. Duluth, 77 N. W. 815.

State v. Pederson, 114 N. W. 828.

Henry County v. Salmon, 100 S. W. 20, at 24.

The provisions of Section 5073 are solely for the protection of the public and its money and, in so far as the filing of the bond is concerned, it is not material for the protection, benefit or advantage of a surety or guarantor such as defendant.

Peoples v. Edwards, 9 Cal. 286.

Deer Lodge County v. U. S. F. & G. Co., 112 Pac. 1060.

Buhrer v. Baldwin, 100 N. W. 469.

Henry County v. Salmon, 100 S. W. 20, at 24.

This being the holding of the Court, it is not necessary to consider the effect of the bond as a common law obligation."

In the case of Board of Commissioners v. Bank of Duluth, Supra, involving a depositary bond, the Supreme Court of Minnesota observed thus: (Op. p. 817):

"Counsel for the defendants urge that this is not a case of suretyship for a public officer, and that the obligation of the defendants does not in any manner relate to the performance of official duties due to the public, and hence that the case mut be governed by the rules applicable to private bonds to secure the performance of duties

due to private persons. In this counsel is in error. While the bank may not have been a "public officer", in the popular sense of that term, yet in the matter of the county money deposited with it it was performing public duties, or duties to the public, and pro hac vice was a public officer. Its duty was to the public, and its bond to secure the performance of that duty was for the benefit and protection of the public. The case falls within all the reasons of the rule, founded on public policy, which makes certain distinctions between the rights and liabilities of sureties on private bonds and sureties on bonds given to secure the performance by public officers of their official duties to the public. The case must be determined by the rules applicable to the latter."

In a like case the Supreme Court of Wisconsin in State v. Pederson, Supra, said, (Op. p. 829):

"The bond in suit here was an official bond because prescribed by public law. Murfee on Official Bonds, Sec. 36; Faurote v. State, 110 Ind. 463, 11 N. E. 472; Hart v. U. S., 95 U. S. 316, 24 L. Ed. 479. The bank was an authorized state depository charged with the public duty of safely keeping and paying over such state moneys as should be deposited with it, and thus became a public officer."

See also County Commissioners v. State Bank, (Minn.), 66 N. W. 143. The Supreme Court of Oklahoma in Western Casualty etc. Co. v. Board of Com-

missioners, 159 Pacific (Op.) 658, quoted from that case as follows:

> "In County Commissioners v. State Bank, supra, the board of county commissioners had designated the depositary in the teeth of a statute requiring the board of auditors to make the designation. In a suit on the bond the sureties defended on the theory the designation was void. What was said in disposing of that contention is applicable in this case, viz.: 'In principle, this case falls within the rule that the sureties upon an official bond, by virtue of which the officer has been inducted into office, cannot, when called upon to answer for his official defaults, escape liability upon the ground that their principal was not duly elected or appointed, or did not legally qualify. Mechem, Pub. Off., Sec. 341; 2 Brandt, Sur. Sec. 521; State v. Bates, 36 Vt. 387; People v. Evans, 29 Cal. 429; Byrne v. State, 50 Miss. 688; Taylor v. State, 51 Miss. 79."

See also Henry County v. Salmon, (Mo.) 100 S. W. 20.

Plaintiff in Error contends that no showing was made of a designation of the First International Bank of South Bend as depositary; no contract was shown requiring the bank to pay interest on average daily balances, and particularly complains that no designation fixing the maximum amount of deposits was shown, and no showing made on the part of the

Treasurer that he had any right to deposit any money in the bank.

(Brief, pp. 8-9)

It is true that a written designation fixing the maximum amount of deposits was not introduced in evidence, and there is nothing in the record in that regard. There being no evidence in this connection the law presumes that the County Treasurer of Pacific County, Washington, performed his duty, and in the light of that presumption the trial court assumed, and this Court will assume, that the County Treasurer did not at any time deposit moneys in the First International Bank of South Bend, Washington, in excess of the maximum amount fixed in the designation.

The bond itself recites,

> "Whereas the said principal, First International Bank has been designated * * * as a depositary * * * etc."

This recital contained in the bond, which plaintiff in error itself executed, estops it to deny that the bank was so lawfully designated.

Henry County v. Salmon, (Mo.) 100 S. W. 20.

In the course of its opinion the Court observed thus, (Op. p. 23):

"When faith and credit have been given to a depositary bond and such bond has performed the function of obtaining for its principals money, property or other valuable thing, it illy becomes its obligors to invoke immaterial variances from statutory form in avoidance of liability. Bonds of like character have been held binding, though not in precise statutory form. State ex rel. v. O'Gorman, 75 Mo. 370; Newton v. Cox, 76 Mo. 352; Wimpey v. Evans, 84 Mo. 144.

And, finally (if the foregoing were not conclusive), it must not be lost sight of that the bond in suit narrates that Salmon & Salmon were selected as county depositary. The proof is that, on the making of the bond and its filing and approval, Salmon & Salmon became the county depositary. They assumed and acted that role, received all the county moneys as such depositary, and thereby to all intents and purposes became county depositary de facto. By signing and delivering the bond in suit the sureties intended Salmon & Salmon should be county depositary. That act enabled them to get hold of the county moneys. Under such conditions it becomes immaterial whether there was any formal order designating Salmon & Salmon county depositary. Such order was not intended for the benefit of the sureties, it was no concern of theirs. Its office was to give authority to the depositary to demand the county funds from the treasurer, and its force is spent in that direction. Section 6821, supra. The engagement of these sureties was to stand sponsor for Salmon & Salmon—to answer for their default. Now, that default could arise as well on an irregular as regular, designation of them as depos-

itary—whether they were a depositary de facto or de jure. Moreover, thebond was for the benefit of the public, not the sureties."

In Commissioner of Hennepin County v. State Bank, (Minn.), 66 N. W. 143, the Court said:

"In the case of Board v. Gray (Minn.) 63 N. W. 635, we held, in an action upon a bond similar to the one here in question, that the provisions of the statute relating to the designation of county depositaries were for the benefit of the public, and not for the sureties, and that, where the depositary was actually designated by the board of auditors, a failure to comply with the requirements of the statute in making such designation would not affect the liability of the sureties; or, in other words, if the principal in the bond was a de facto depositary of the county funds, recognized as such by the treasurer and other county officers, and the county funds were actually deposited with the principal, as such depositary, in reliance upon the bond, the sureties were liable, in case of default in the conditions in the bond, although, in law, the principal was never designated as a depositary. Public interests would be seriously jeopardized if the sureties upon a county depositary bond could exonerate themselves from liability by showing that he was not such de jure. It is true, the condition of the bond is that, if the principal shall be designated a depositary pursuant to the statute, the sureties shall be liable for its default: but the regularity or legality of the designation is not of the substance of the condition, for its substance is that if the funds of the county are de-

posited with the principal, as a depositary, it shall pay over the money on demand. Depositaries of county funds, under the statute, are quasi public officers. They are financial agents of the county, and hold its funds in place of the treasurer. The allegations of the complaint show that the bank was a de facto depositary, and was recognized as a lawful depositary by the board of county commissioners and the county treasurer, and the public funds deposited with it in reliance upon its official bond; but it was not a de jure depositary, because it was designated by the board of county commissioners, and not by the board of auditors. In principle, this case falls within the rule that the sureties upon an official bond, by virtue of which the officer has been inducted into office, cannot, when called upon to answer for his official defaults, escape liability upon the ground that their principal was not duly elected or appointed, or did not legally qualify. Mechen, Pub. Off. Sec. 341; 2 Brandt, Sur. Sec. 521; State v. Bates, 36 Vt. 387; People v. Evans, 29 Cal. 430; Byrne v. State, 50 Miss. 688; Taylor v. State, 51 Miss. 79. In the last case cited the officer's appointment was void, and it was held that the sureties, when sued on his official bond, could not set up the illegality of the appointment as a defense. So, in the case at bar, the designation of the principal in the bond as a county depositary was absolutely void, because made by the board of county commissioners, and not by the board of county auditors; still it was in fact a depositary, and was inducted into office, and the county funds deposited with it, in reliance upon the bond, and the fact that it was not designated such depositary by

the proper board does not exonerate the sureties on the bond. Order reversed."

In Talley v. State, 180 S. W. 330, (Ark.), the Court observed thus:

> "There was an order approving the bond which recites the fact that the bank had been duly designated by the county court as such county depositary, and the funds of the county were paid over to the bank. The bank and its sureties are estopped to deny that there had never been a designation of the bank as such depositary. Hennepin County v. State Bank, 64 Minn. 180, 66 N. W. 143."

To the same effect is Buhrer v. Baldwin, 100 N. W. 468.

Commissioners v. American Loan & Trust Co., 78 N. W. 113.

Plaintiff in Error complains bitterly, (Brief pp. 8-9), because action was not taken on the official bond given by the Treasurer as such to Pacific County, instead of on its depository bond, which, as we have shown, is governed by the same rules as apply to official bonds. The fact, if it be a fact, that the people of Pacific County have double security for their money is a circumstance of no legal importance. If they are so secured the officials of that County are the ones who have the right to determine to which

security they will first resort. So far as the record in this case is concerned it does not enable anyone to say with certainty that the Treasurer's official bond to the County is sufficient, so therefore it cannot be said that the County will not lose its money if it is defeated in the present action.

Counsel takes the position, (Brief, p. 9), that the bond in question did not become effective until filed in the office of the Clerk of the Superior Court, quoting from Section 5073 of the Code.

As our argument in this connection we offer the following from Judge Cushman's opinion:

> "The provisions of section 5073 are solely for the protection of the public and its money and, in so far as the filing of the bond is concerned, it is not a matter for the protection, benefit or advantage of a surety or guarantor such as defendant.
>
> Peoples v. Edwards, 9 Cal. 286.
> Deer Lodge County v. U. S. F. & G. Co., 112 Pac. 1060.
> Buhrer v. Baldwin, 100 N. W. 469.
> Henry County v. Salmon, 100 S. W. 20, at 24.
>
> This being the holding of the Court, it is not necessary to consider the effect of the bond as a common law obligation."
>
> (Trans. p. 30)

In People v. Edwards, Supra, Justice Field said:

> "The defect in the approval of the bond, if any existed, could not avail the defendants. The object of requiring the approval is to insure greater security to the public, and it does not lie in the defendants to object that their bond was accepted without proper examinations into its sufficiency by the officers of the law."

In 1850 the State of California adopted a statute referring to bonds containing the exact essentials of Sections 777 and 8327 of the statutes of the State of Washington, R. & B. Code above referred to. This statute was carried forward with slight changes not effecting its substance, and is now Section 963, Pol. Code Cal. 1897. It was considered by Justice Field in People v. Edwards, 9 Cal. 286, and later in People v. Evans, 29 Cal. 430, where it was held that the sureties on a bond were not released even though the bond was approved by the wrong officer, which in effect amounted to no approval at all.

This was followed in Mendocino County v. Morris, 32 Cal. 145, and in People v. Huson, 78 Cal. 154, where the Court said:

> "The settled rule is that the failure of the proper officers to approve an official bond will not invalidate it nor release the sureties from their liability upon it."

All of these California cases were decided prior to the adoption of our Code, (Laws of 1890, p. 35).

(Code of 1881, Sec. 749).

Having borrowed these sections from the California Code it will be assumed that in so adopting them our legislature intended that the construction theretofore given by the highest court of California should be the rule for the construction of those statutes.

It is next contended, (Brief, p. 13), that there was no acceptance of the bond. Under this heading counsel cite a number of authorities which under their facts are so far removed from the case at bar that a discussion of them would serve no useful purpose. This question of fact was resolved by the the trial court against plaintiff in error in its finding by way of adjudication, as follows:

> "It is further adjudged and decreed that said bond was accepted by the county treasurer of Pacific County, Washington, for present purposes, and until such time as defendant would furnish it a new bond containing the provisions suggested in the county treasurer's letter of July 14th, 1915.
>
> "That it required one day for this letter to reach Seattle, Washington, from South Bend, Washington, but that it was not answered by defendant until after the 19th of July, 1915."

(Trans. p. 39.)

In this connection Judge Cushman in his Memorandum Decision said:

> "In view of the treasurer's testimony that he and the county attorney approved the bond on July 12th, it is not necessary to consider what, if any, effect the want of such approval would have. It is true that the treasurer, in his letter of July 14th to the defendant, says:
>
> " 'The Prosecuting Atty. refuses to approve any bond carrying the **pro rata** clause.'
>
> "If this be construed as meaning that the county attorney had not approved the bond, in view of the treasurer's sworn testimony that the bond had already been approved by both the county attorney and himself on the 12th of July, coupled with the fact that, on the 13th and 14th —immediately after the receipt of the bond, the treasurer made $8000 deposits, which he could not legally make without the bond, yet such unsworn misstatement does not justify the rejection of the sworn testimony, supported by such conduct.
>
> "The fact that the treasurer disobeyed the direction of the statute and deposited this money before the filing of the bond with the county clerk in no way takes from the presumption that he, as a public officer, did his duty in other respects.
>
> "The defendant's contention that, before it became bound, notice to it of the acceptance of the bond by the county was necessary and that no such notice was given yet remains for consideration. It is not necessary to determine

the first question, unless, in fact, no such notice was given.

"Passing the question of whether or not the defendant is not inconsistent in contending that the treasurer—who, it maintains, had no authority to accept the bond—could reject it, there is no statute requiring notice to the guarantor. The treasurer's letter is not a present rejection of the bond.

"Although the bond does not purport to run for any particular term, the defendant could not terminate its liability, save upon 30 days notice of its election so to do.

"If entirely satisfactory, it was, no doubt, contemplated that the bond should run for months. The provisions for the monthly report by the bank depositary to the treasurer, alone show this. But there is nothing in the statute, nor the bond, that obligated the county or the treasurer to accept the bond for a definite term or, once accepted, to retain such bond and not require any other in lieu of it for any definite time. It might hold the bond for a day or a year, or until the next January when it would become the duty of the treasurer to designate a depositary.

"The pains taken by the treasurer in his letter to point out that, upon receipt of a bond worded to the satisfaction of the county attorney, the bond received and held, would be returned in one of two ways, as the defendant might choose, show that the bond delivered had been accepted for the present, but, as the county and treasurer were not bound to accept it for a defi-

> nite time, it was accepted until the imposed conditions were complied with; that, for present purposes, pending negotiations, it would be accepted, but that, unless the imposed conditions were met, it would be rejected.
>
> "The letter clearly shows an intention only to reject the bond, by either returning it to the defendant's agent at South Bend, or direct to the defendant in Seattle. This, of itself, is a notice of present acceptance pending negotiations for a more satisfactory bond."
>
> (Trans. pp. 32-33-34.)

The authorities cited by counsel in this connection to the effect that the bond in the instant case did not become a binding contract until formal notice of acceptance thereof was given, has no application here, first, because it was accepted as found by the trial court, and secondly, even if it were not accepted no formal notice of acceptance was necessary.

The case of Buhrer v. Baldwin, 100 N. W. 469, presents a parallel state of facts. In the course of its opinion the Court said, (Op. p. 470):

> "It is insisted that defendants are not bound by their guaranty, because they have never been notified of its acceptance. We think the true theory upon which guarantors are entitled to notice of acceptance is that their undertaking is a mere offer, and does not become a binding contract until such notice. See Davis v. Wells, 104

U. S. 159, 26 L. Ed. 686. It results from this theory that guarantors are entitled to notice of acceptance only when their undertaking can be construed to be an offer of guaranty. When, however, that undertaking recites a consideration, though, as in this case, that consideration is merely nominal, conclusive evidence is furnished that the guaranty has been made with the assent of the obligee, communicated to the guarantors; and in such cases notice of acceptance is unnecessary."

The bond in the instant case recites:

"Whereas the said Bank in consideration of such deposits and of the privilege of keeping same."

The bond being one entire and original contract and not collateral on the part of the sureties, the consideration received by the bank was sufficient to support the contract on the part of the bonding company.

U. S. v. Linn, 15 Peters, 290. 10 L. Ed. 742.

Indeed, the testimony shows that the bonding company was receiving a premium as consideration for the execution of this bond, which, of course, was known to the bank and the treasurer as well, and when this completed contract was turned over by the bank to the County Treasurer it became effective.

Counsel next contends that there was not sufficient proof of approval of the bond prior to the failure of the bank. This fact was likewise resolved against plaintiff in error by the trial Court.

In the course of his Memorandum Decision Judge Cushman said:

> "Under the statutes and authorities cited above, it was not necessary, in order for the bond to become effective, that it be filed with the county clerk. It became an obligation binding upon the defendant when the bank delivered it to the treasurer and received, on July 13th and 14th, deposits from him under its protection.
>
> In view of the treasurer's testimony that he and the county attorney approved the bond on July 12th, it is not necessary to consider what, if any, effect the want of such approval would have. It is true that the treasurer, in his letter of July 14th to the defendant, says:
>
> 'The Prosecuting Atty. refuses to approve any bond carrying the **pro rata** clause.'
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> If this be construed as meaning that the county attorney had not approved the bond, in view of the treasurer's sworn testimony that the bond had already been approved by both the county attorney and himself on the 12th of July, coupled with the fact that, on the 13th and 14th, immediately after the receipt of the bond, the treasurer made $8000 deposits which he could not legally make without the bond, yet such unsworn misstatement does not justify the rejection of the sworn testimony, supported by such conduct.

The fact that the treasurer disobeyed the direction of the statute and deposited this money before the filing of the bond with the county clerk in no way takes from the presumption that he, as a public officer, did his duty in other respects."

(Trans. pp. 31-32)

In this connection it will be remembered that the Treasurer made deposits of Eight Thousand Dollars, which he could not have legally made without the protection of this bond, because as the record shows, the bond of the Illinois Surety Company expired on July 1st, 1915.

(Glazebrook, Trans. p. 51)

This fact having been found against plaintiff in error by the trial court on evidence amply establishing it, no good purpose would be served by a further discussion of it.

Under the title, "Bond not Retrospective," (Brief, p. 24), counsel for plaintiff in error discuss the question of construction of the bond involved.

In this connection we can do no better than to again quote from the Memorandum Decision of Judge Cushman, wherein he said:

"The condition of the bond that,

'If the principal * * * shall well and truly keep all such sums of money so deposited, or to be de-

posited, as aforesaid, * * * then this obligation to be void and of no effect.'
must be construed to contemplate all present and future deposits. Any other construction is, necessarily, forced and strained.

Kephart v. Buddecke, 80 Pac. 501.
Myers v. Board of Commissioners, 56 Pac. 11.
Brown v. Board of Commissioners, 50 Pac. 888.

It is true that in Brown v. Board of Commissioners, (80 Pacific, 501, supra) certain recitals of the bond were different from those of the bond in the present case and that the Court in its ruling, to a certain extent, relied upon these different provisions.

It is a well-known rule of construction, both of statutes and written instruments that all the words used must be given a meaning, unless inconsistencies would result therefrom.

If only future deposits were in view the words would have been 'so to be deposited as aforesaid.' If the meaning of the instrument is as contended for by the defendant, the words 'so deposited' serve no purpose. The reference to the prior recital, indicated by the use of the words 'so' and 'aforesaid' could only relate to the terms of the deposit 'subject to withdrawal or dimunition by said treasurer as the requirements of said county shall demand.' "

(Trans. pp. 30-31)

Plaintiff in Error being a compensated surety

canot invoke the rule of strict construction. Its contract must be construed as other contracts to effectuate the intention of the parties, and the purposes they sought to accomplish.

Puget Sound State Bank v. Gallucci, 82 Wash. 452.

Costello v. Bridges, 81 Wash. 202.

The purpose of making the contract was to protect Pacific County against the loss of its money. It was known to the bonding company that the First International Bank of South Bend had been designated in the month of January, 1915, as a depositary of the public moneys of Pacific County. That fact is recited in the bond itself, and the bond in question given under date of July 9th, 1915, referring to said moneys provides:

> "Now, therefore, if the said First International Bank shall * * * * * well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of J. L. Glazebrook, Treasurer, as aforesaid, and shall pay over the same, or any part thereof, upon the check or written demand of said Treasurer, or his successor * * * *, and shall save and keep the said County and the County Treasurer * * * harmless, and indemnified for and by reason of the making of said deposit, or deposits, * * * * then this obligation shall be void, etc."

The case of Kephart v. Buddecke, (Col.), 80 Pac. 501, involved deposits made under a bond containing in effect the identical language involved here. We quote therefrom, (Op. p. 502).

> "Now, therefore, if the said Bank of Montrose shall well and truly keep all said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of the said George W. Kephart, treasurer as aforesaid, and shall pay over the same and each and every part thereof, to the said Treasurer upon his written demand therefor, and shall estimate, calculate and pay said per centum as aforesaid, and shall, in the event said money or any part thereof remain in its custody after the expiration of the term of office of said George W. Kephart, pay over such sum or sums to his successor in office, as shall by him demanded and shall in all respects save and keep him, the said George W. Kephart, and his sureties to the state of Colorado, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation to be void, and of no effect, otherwise to be and remain in full force and virtue."

In the course of its opinion the Court observed thus, (Op. p. 503):

> "Effect must, if possible, be given to every clause and every word; and no word is to be regarded as superfluous if a meaning which is reasonable and in harmony with the other parts of the contract can be assigned to it. 17 Am. &

Eng. Enc. of Law (2nd Ed.) 7; Lawson on Contracts, Sec. 389; People v. May, 9 Colo. 80, 10 Pac. 641; Vary v. Shea, 36 Mich. 388; Heywood v. Heywood, 42 Me. 229, 66 Am. Dec. 277; Philadelphia v. River Front R. Co., 133 Pa. 134, 19 Atl. 356. The word 'so' and the words 'as aforesaid,' with which it is associated, were intended to render the meaning of the words 'deposited' and 'to be deposited' definite. The entire phrase, filled out and completed would read, 'All said sums of money so deposited as aforesaid, or all said sums of money so to be deposited as aforesaid.' In point of time the first clause refers us to the past, the second to the future. The word 'said' preceding the word 'sums,' and the words 'so' and 'as aforesaid,' all point to something previously mentioned in the instrument. We have no authority to pronounce any of them meaningless, if in the preceding language anything can be found which serves to fix its connection or determine the office it was intended to perform. Respecting the words, 'so to be deposited as aforesaid,' there is no difficulty. They are too obviously connected with, and for their meaning dependent upon, the recital, 'Whereas, the said George W. Kephart, treasurer as aforesaid, has determined and will deposit certain of the moneys of the state of Colorado, for safe-keeping, with and in the Bank of Montrose,' to require discussion, or even comment."

In the case of Brown v. Board of Commissioners of Wyandotte County (Kan.), 50 Pac. 888, an action

on a depositary bond, the Court discussing a bond conditioned as follows:

> "The conditions of this obligation are such that if the said Argentine Bank shall promptly pay any and all deposits of the county which may be so deposited with it, as such county depository, upon the check or draft of the county treasurer, countersigned by the county clerk of said county, and shall well and truly make report of the amount of money to the credit of the county treasurer at the close of business each day during the previous month, and shall also report and pay the amount of interest accrued during such month, at the rate of one and one-half per cent per annum on all daily balances, then, in that event, this obligation shall be void."

held the bonding company liable for past as well as future deposits. In the course of its opinion the Court said:

> "Plaintiffs in error claim to find such limitation in the words 'shall pay any and all deposits of the county which may be deposited with it.' By stress of emphasis upon the auxiliary verbs 'may' and 'be' counsel endeavor to read them wholly into the future tense, and thereby give the bond a prospective signification. Grammatically the clause 'which may be deposited' may have as much the signification of past or present as of future time. The law will principally look at the purpose for which the instrument was required and given, to determine the tense of the verb. That purpose was security for the current

> obligations of the bank to the county; that is, for the repayment of such deposits of money as may have been made before demand of payment therefor. The legal authorities in analogous cases support this view."

If there is any material difference in the meaning of the language of the bond in the case at bar, and the obligations involved in the two cases last above cited, the retrospective feature is stronger in the instant case than in those cases. If the doctrine of probabilities, as suggested by plaintiff in error, is involved here, it is altogether probable that the purpose of the bond was as suggested in the Kansas case, security for the obligations of the bank to the county, that is, for the repayment of such deposits of money as may have been made before demanding payment thereof.

THE BOND WAS GOOD AS A COMMON LAW OBLIGATION.

While it is conclusively established by the proof in this case, and was found by the trial court, that the bond was duly accepted and approved on July 12th, and was therefore a statutory bond, still if that had not been done, the bond having been voluntarily

executed by the bonding company and accepted and acted upon by the County Treasurer of Pacific County was good as a common law obligation, and if we grant everything contended for by the plaintiff in error the bonding company is still liable.

The general rule is well stated by Mr. Brandt in his work on "Suretyship and Guaranty." Vol. 1, Sec. 22:

> "The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily for a valid consideration, and if it is not repugnant to the law or policy of the law, and the surety on such bond is bound thereby. The voluntary bond of a State Treasurer which is not demandable by law of a county treasurer where there is no law prescribing a bond to be given of a deputy collector of customs, where there is no law prescribing a bond to be given of a plaintiff in an attachment suit when no bond is required by law, are all valid, and bind the sureties who sign them."

Puget Sound State Bank v. Gallucci, 82 Wash. 457.

Buhrer v. Baldwin, 100 N. W. 468.

U. S. v. Linn, 15 Peters, 290, 10 L. Ed. 742.

Federal Case No. 15747, (Op. by Chief Justice Marshall.)

Smith v. Bowman, 9 L. R. A. (N. S.) 889.

Deer Lodge v. Fidelity Co., 112 Pac. 1060.

U. S. F. & G. Co. v. Rainey, 113 S. W. 397.
Hart v. U. S., 95 U. S. 316, 24 L. Ed. 479.

In the latter case the Court said:

"The government is not responsible for the laches or wrongful acts of its officers. (Citing cases.) Every surety upon an official bond to the government is presumed to enter into its contract with the full knowledge of this principle of law, and to consent to be dealt with accordingly."

This rule is tersely stated in Cyc. thus:

"The bond of a de facto depositary is binding where public funds have been deposited with it in reliance thereon, although the designation of the depositary was not made in accordance with the statute."

13 Cyc., 816.

The benefits accruing to the Bank by reason of the making of the deposits were sufficient consideration for the bond, and the transaction being one where the bank received a consideration it supported the contract on the part of the surety.

U. S. v. Linn, supra.

In U. S. v. Hodson, 10 Wallace 409, (19 L. Ed. 937), it was said:

"But where it (bond) is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors."

THE AMOUNT OF THE JUDGMENT.

Counsel contends that the judgment of $9281.32 entered against it by the Court is excessive. The loss suffered by the Treasurer was $52,457.97, and the total of all bonds and securities was $56,519.94. (Eliminating the Ten Thousand Dollar bond of the Illinois Surety Company, which expired on July 1st, 1915), and the liability of plaintiff in error was adjudged to be such proportion of Ten Thousand Dollars as $52,457.97 bears to the sum of $56,519.94.

The provisions of the other bonds and securities nowhere appear in the record, but it does appear that subsequent to the filing of the bond in the instant case that the Treasurer made Eight Thousand Dollars of deposits. Four Thousand Dollars was

checked out without a special application of the amount, and, of course, would be credited on the oldest obligation.

> Commissioners v. Citizens' Bank, 69 N. W. 912.

This would leave Eight Thousand Dollars deposited under the protection of the bond in question.

Now, if we concede, (for the sake of argument, which we do not), the bonding company's contention that it's obligation was prospective only, and covered future deposits, still it would be liable for Eight Thousand Dollars.

On July 9th, 1915, there was on deposit \$50,349.-00 protected by securities of the face value of \$46,-519.94. Under the statutes it is made the duty of the County Treasurer before making any deposit to have and file a surety bond, etc., and indulging the presumption that the Treasurer did not violate the statute it follows that the Eight Thousand Dollars deposited by him on July 13th and 14th, after receiving the bond of plaintiff in error, was deposited under the protection of that bond alone, and not otherwise. To hold otherwise would convict the Treasurer of violating the statute.

We respectfully submit the judgment of the Lower Court should be affirmed.

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